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Nos. 234, 257, 304, 305, 308, 310, 313 and No. 235 Misc.

In the Supreme Court of the United States

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OCTOBER TERM, 1959

STEVE PEKO, PETITIONER
v.
UNITED STATES OF AMERICA

DANIEL LEBBA AND NICHOLAS LEBBA, PETITIONERS
v.
UNITED STATES OF AMERICA

HARRY STROMBERG AND LEO SETO, PETITIONERS
v.
UNITED STATES OF AMERICA

HENRY TEITELBAUM, PETITIONER
v.
UNITED STATES OF AMERICA

NATHAN BEHRMAN, PETITIONER
v.
UNITED STATES OF AMERICA

SALVATORE MARIONNE, PETITIONER
v.
UNITED STATES OF AMERICA

ANTHONY MIRRA, JEAN ARON AND GEORGE BRISBOIS, PETITIONERS
v.
UNITED STATES OF AMERICA

MARTIN DE SAVERIO, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (5 R. 477–506[1]) has not yet been reported. It is set forth as an Appendix to each of the petitions for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1959 (5 R. 508). On July 2, 1959, Mr. Justice Brennan extended the time for filing petitions for writs of certiorari to August 14, 1959, and each petition was filed on or before the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established a single, continuing conspiracy as charged.

2. Whether the joint trial of the twelve petitioners and seven other defendants, on an indictment charging a total of 46 defendants and naming 16 others as co-conspirators, deprived petitioners of a fair trial.

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[1] The printed record consists of the Appellants' Appendix in the court of appeals, in four consecutively paginated volumes, and the Government's Appendix in that court, in one volume (numbered "Volume V" in this Court), the pagination of which is not consecutive to that of the other four. The proceedings in the court of appeals have been appended to this fifth volume. "R." refers to the four consecutively paginated volumes, "5 R." to the fifth volume, and "Tr." to the reporter's transcript.

3. Whether the evidence is sufficient to sustain the convictions of petitioners Teitelbaum, Puco and De Saverio.

4. Whether the rule requiring that extrajudicial admissions be corroborated applies to statements made during and in furtherance of a conspiracy.

5. Whether, where the record of a court-martial conviction of a government witness had been offered and received for impeachment purposes, it was error to exclude the court-martial trial transcript, offered to show that witnesses had appeared at the court-martial trial against the government witness, the latter having testified (in this case) that he did not remember whether witnesses appeared against him.

6. Whether the statement by a government witness (made in response to a defense attorney's question which sought to impeach him), that one of the defendants on trial was in jail at a certain time, required a mistrial.

7. Whether the trial court properly refused to order the government to turn over to the defense, for cross-examination purposes, a report by a government agent summarizing oral statements made to the agent by a government witness, where the report was not a "statement" as defined in 18 U.S.C. 3500 (the so-called "Jencks" Act).

8. Whether the trial judge correctly instructed the jury concerning accomplice testimony and the caution with which they should consider it.

9. Whether the prosecuting attorney was guilty of prejudicial misconduct.

STATEMENT

A single count indictment (R. 38–47), filed October 23, 1957 (R. 2) in the United States District Court for the Southern District of New York, charged petitioners, together with 34 other defendants and 16 persons named as co-conspirators but not as defendants, with having conspired, from about January 1, 1950, to May 1, 1956, in violation of 18 U.S.C. 371, to violate 18 U.S.C. 212 (bribery of customs officials) and 21 U.S.C. 173 and 174 (importation of narcotic drugs into the United States and receipt, concealment, purchase, or sale of such drugs following and with knowledge of their unlawful importation), and to defraud the United States of its right to have the Customs Service administered free from corruption. Thirty overt acts were alleged (R. 41–47). Following a trial by jury, petitioners (and others not before the Court) were found guilty[2] and were sentenced as follows: Stromberg, Behrman, Daniel Lessa, and De Saverio were each sentenced to five years' imprisonment (R. 1787–1792, 1803–1804); Maimone, four and one-half years (R. 1799–1800); Puco, Nicholas Lessa, Teitelbaum, and Aron, four years (R. 29, 33, 1805–1806, 1967–1968); Mirra and Brisbois, three and one-half

[2] Of the 34 defendants besides petitioners, two pleaded guilty (R. 21, 22), 14 were granted severances (5 R. 4–5), 11 were fugitives or remained unidentified at the time of trial (5 R. 4), one was acquitted at the close of the government's case (R. 25), and six were convicted. Of the six who were convicted, one did not appeal, one died pending his appeal, the government confessed error as to one, and three won reversals in the court of appeals (5 R. 480 (n. 4), 492–494, 506).

years (R. 1801–1802, 1969–1970); and Seto, two and one-half years (R. 34). In addition, Stromberg and Brisbois were fined $10,000 each (R. 1787–1788, 1969–1970). On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction of the petitioners were unanimously affirmed (5 R. 508).[3]

The evidence adduced by the government may be summarized as follows:

1. From some time in the latter part of 1949 to April or May of 1951 petitioner Aron, in association with John Baruche, a defendant who remained a fugitive as of the time of the trial (5 R. 4), was in the business of importing electrical resistors from Europe (R. 303–305, 307, 309, 311, 358–359, 362). Throughout this period Saul Gelb (a co-defendant who pleaded guilty—see No. 159, this Term), whom Aron described to a business associate as a man who "had been in the narcotic business," used to visit their office two or three times a week (R. 307–309). In April or May of 1951, at about which time the "resistor business came to an end" because "there was no more market for European resistors," Aron moved to a larger office (R. 311, 362, 374–375).

In July 1952, Jean Lafitte, a government informant and witness, met Aron in the latter's office (R. 121). Shortly thereafter, through Aron, he met Gelb, Baruche, and petitioner Brisbois, whom Aron introduced as "his Canadian representative" (R. 123–126). On October 24, 1952 (R. 126, 127), at a meeting attended

[3] The convictions of three appellants were reversed by the court of appeals on the ground that the evidence was insufficient to sustain their convictions (5 R. 492–494, 506, 508).

by Aron, Baruche, Gelb, Brisbois, and Lafitte, Gelb complained to Baruche that "the price of heroin in France he is paying" was "too much" (R. 127–128). At the same meeting Brisbois complained to Gelb that he had "lost $80,000" and that Gelb had to "straighten out the Boston people" (R. 128). Shortly following this meeting Gelb told Lafitte that he had had "a lot of difficulty with the Canadians" and asked Lafitte to go with Aron to Boston to help "straighten the matter out" (R. 131). Aron, who was present, suggested that the group "buy a coal yard in Boston outright" for use in "smuggl[ing] narcotics" (R. 131–132).

On November 9, 1952, Lafitte and Aron drove to Boston, where Aron, Brisbois, and one Bucelli, a defendant who died pending appeal from his conviction, discussed the problems troubling the organization (R. 132–135, 137–139). Brisbois complained to Bucelli that, although Brisbois and his Canadian associates had just "lost $80,000 in narcotics," Bucelli would not refund the ten per cent "cut" he had taken, and he told Bucelli that he wanted to stop doing business with him (R. 137–138). Bucelli chided Brisbois for being "very independent now," saying, "When you needed us to smuggle narcotics through the coal yard we be good enough for you. But now that you got somebody else, maybe another one way to to do it, you don't want to pay any more" (R. 138). Later Lafitte asked Brisbois what was behind all the "big discussions about that coal yard" (R. 141). Brisbois said that the coal yard had been "a good deal for a time"; that through it they had recently

smuggled into the country, at a good profit, 1,200 pounds of opium and six kilograms of heroin; but that "paying that 10 per cent to smuggle that thing through" was "too much" and he did not "want it any more" (R. 141–142).

During the week following the trip to Boston, Gelb, Aron, and Baruche sought to persuade Lafitte to join them in their "narcotic business," but Lafitte told them he was not interested at that time as he "wanted to know more about" it first (R. 148). Also during this week Lafitte was introduced by Aron in Aron's office to petitioner Behrman (R. 146–147), Herman Samnick, and Benjamin Danis (R. 149–151). Samnick and Danis, defendants whose convictions were reversed by the court of appeals because of evidential insufficiency as to them, were customs officials whom Aron described to Lafitte as two of "his Customs men" who were "on the payroll" (*ibid.*). At a meeting in the latter part of November 1952, attended by Lafitte, Gelb, Aron, Baruche and Samnick, Gelb and Baruche again urged Lafitte to "join the combine" (R. 151–152). And at a meeting in Aron's office in December 1952, attended by Lafitte, Gelb, Baruche, and Danis, when Lafitte expressed concern about the danger of detection in the smuggling of large quantities of narcotics, Danis sought to reassure Lafitte, saying he "kn[ew] his business" and could, if he wished, "go with a truck across" (R. 159–161). However, Lafitte never accepted the group's invitation to join their organization. After reporting the information he had ob-

tained to the Bureau of Narcotics, he proceeded to undertake other investigative assignments (R. 180–181, 242, 277–279, 298–300).

Anthony Vellucci, a named co-conspirator, was a wholesale peddler of narcotics in New York City (R. 455–456). One of his regular customers was government witness James Ewing (R. 455–458), who sold the narcotics he bought from Vellucci to customers in Detroit (R. 461–462). During the fall of 1953 (R. 460), Vellu[illegible] told Ewing that he was going to start buying his heroin from a "different source," the "mob around 50th and Broadway" (R. 458). Shortly thereafter Vellucci told Ewing that he had "made a connection with" Gelb and Behrman (R. 458–459).[1]

In November or December 1953, Vellucci introduced Ewing to Behrman as "his man that he had in Detroit distributing narcotics for him" (R. 460–461). In December 1953 or January 1954 (R. 464), Vellucci introduced Ewing to Gelb, the "head of the organization" (R. 465). Vellucci told Gelb that Ewing was "the man he had out in Detroit that was selling narcotics there for the mob" (*ibid.*) and that he "was handling a half kilo at a time for them" (R. 466). Three weeks later Ewing and Vellucci met Gelb and Behrman at a Manhattan hotel (R. 466–468). Enroute to the hotel Vellucci inquired if Ewing had any money for him, and Ewing gave him $4,500 (R. 467–468). At the hotel Vellucci delivered to

[1] Behrman had been introduced to Lafitte by Aron in Aron's office approximately a year earlier (*supra*, p. 7).

Gelb, in Behrman's presence, the $4,500 he had received from Ewing, together with other money which he took from his pocket (R. 468–469).

In March 1954, Jacqueline Lithauer, a friend of Baruche's, flew from New York to Paris, where she delivered to Baruche a sealed envelope which Behrman gave her shortly prior to her departure (R. 431–441; 5 R. 65–66). Behrman asked Miss Lithauer to deliver the envelope to Baruche, who he said "was waiting for it" (R. 440).

On March 5, 1954, Gelb was arrested (5 R. 30–33) and large quantities of heroin and opium were seized from his person and apartment (R. 476; 5 R. 33, 40, 42–46; Tr. 792–794). Gelb's arrest was a serious blow to the organization (R. 476–478, 565). Vellucci and Behrman "didn't know what they were going to do by Gelb being arrested" (R. 477–478). Not only had the group lost one of its leading figures and "the money man in back of the outfit" (R. 565), but it had suffered a severe financial setback in the loss of the large quantities of drugs seized at the time of Gelb's arrest (R. 476). The financial crisis was aggravated, moreover, by the organization's need for money to pay for a "big shipment of heroin" that was "coming in from France" (R. 478).

A few weeks after Gelb's arrest Vellucci told Ewing that the organization had found a man from whom it hoped to obtain $50,000 to finance the incoming shipment of heroin (R. 480–482). This man turned out to be petitioner Stromberg, to whom Ewing was introduced by Vellucci in Behrman's

presence (R. 482–484, 507). A few days later Ewing, Vellucci, and Behrman again met with Stromberg, who on this occasion was accompanied by petitioner Teitelbaum (R. 486–487). Stromberg gave Behrman two packages of $100 bills, totaling $40,000 (R. 486–490, 695–697). Following this meeting Ewing drove Behrman and Vellucci to 39 East 78th Street (R. 490–491). This was the address of Aron's apartment (R. 132–133, 356). They told Ewing that they were delivering the money to "Gene's partner's house" (R. 491). "Gene" was Baruche, "their representative" in France (R. 492). Behrman and Vellucci took the money into the apartment house while Ewing remained in the car (R. 491–492).

A week later Vellucci and Ewing again met Stromberg, Behrman, and Teitelbaum (R. 506–507). Vellucci and Behrman told Stromberg that the shipment of heroin had arrived and that they would have some money for him shortly (R. 508). Ewing distributed ten ounces of this shipment in Detroit, realizing $7,500 from his sales, $5,000 of which he remitted to Vellucci in May 1954 (R. 508–512). Vellucci, on receipt of this money, told Ewing that "they were going to pay Mr. Stromberg $25,000 that afternoon" (R. 513). Vellucci, after procuring additional money from his apartment, which he added to the $5,000 received from Ewing, proceeded with Ewing to a bar. There Vellucci, in the presence of Teitelbaum, delivered to Behrman a bagful of money, which Behrman, after adding additional money, delivered to Stromberg (R. 513–516). Approximately three weeks later Vellucci delivered an additional $20,000

to Stromberg in the presence of Behrman and Teitelbaum (R. 517–522).

Payments of large sums by Vellucci and Behrman to Stromberg continued into 1955 (R. 536–543, 547–554, 814–816). One such payment, at Stromberg's request, was made to Teitelbaum (R. 552–554, 815). Teitelbaum remarked to Vellucci on this occasion that Vellucci "must be unloading lots of drugs" (R. 553). Vellucci replied that he was, but that he was "making you fellows rich also" (*ibid.*).

In June 1955, Behrman told Vellucci and Ewing that he was going to France to meet Baruche and Baruche's suppliers, so that "if anything happened to Baruche" they would "know who to get in touch with to continue the business" (R. 543–546, 791–792). Behrman did go to France, saw Baruche, and later reported on his trip to Stromberg and Vellucci (R. 554–555, 795–796). In the following month Ewing also met Baruche, in New York, where they, Vellucci, Behrman, and Stromberg engaged in a series of discussions concerning a "bad load of heroin" which had been received from France (R. 615–625).

2. Petitioners Puco, Daniel Lessa, Nicholas Lessa, Seto, and De Saverio were retailers (or sub-wholesalers) of narcotics who received their supplies from Vellucci.

Puco was introduced to Ewing by Vellucci in April 1955 (R. 587–588). Ewing did not hear the conversation between Vellucci and Puco on this occasion because they went off to the side and took care

of" their business (R. 588). Three or four days later, Vellucci telephoned Puco to ask him for money which was due, and later that day Ewing saw Puco paying Vellucci money (R. 589–590). Once Puco told Ewing that he had "very good connections of getting heroin" and sought to persuade Ewing to do business with him rather than with Vellucci (R. 591–592). On another occasion, in May 1955, Puco paid Vellucci $3,000 which he owed him for a past delivery or deliveries and placed an order for one kilogram of heroin, to be delivered in two "half kilo packages" (R. 593–594).

Daniel Lessa and Nicholas Lessa, brothers, placed orders for heroin with Vellucci on an average of twice a month between April and November 1955, the orders ranging in quantity from a half kilogram to a kilogram (R. 578–582). On at least a dozen occasions Ewing saw these petitioners give money to Vellucci, in amounts ranging up to $4,000, in payment for past deliveries (R. 583). Vellucci did business with them both jointly and individually (R. 583–586).

Seto purchased half a pound of opium and half a kilogram of heroin from Vellucci in the summer of 1954 (R. 600–604). In May 1955, he ordered and paid for a quarter of a kilogram of heroin from Vellucci (R. 606–607). There were in addition "at least a half a dozen" like transactions between Seto and Vellucci, some preceding and some following the 1955 purchase (R. 607–608).

De Saverio was one of Vellucci's better customers, handling over a kilogram of heroin a week (R. 527–529). Ewing was introduced to De Saverio by Vellucci in the summer of 1954 (R. 528), at which time De Saverio paid Vellucci for heroin previously received (R. 529–530). Vellucci told Ewing he was charging De Saverio $9,000 or $9,500 per kilogram (R. 530). On another occasion Vellucci told De Saverio that the latter owed him $12,000 for past deliveries, and De Saverio paid Vellucci $5,000 on account (R. 533–536).

Another regular and large-scale purchaser of narcotics from Vellucci (*e.g.*, R. 609–612, 955, 967–969, 972, 978) was Joe DiPalermo ("Joe Beck"), a defendant who had not been apprehended as of the time of the trial (5 R. 4). Petitioner Maimone was one of three partners who, in turn, were regular and large-scale purchasers of narcotics from DiPalermo (*e.g.*, R. 932–944, 957–963, 972–974, 976–981). Maimone's partners were government witness Joseph Basile and Vincent Yacono, the latter another defendant-fugitive (R. 928–931, 933, 935, 967). Maimone was the partnership's banker (R. 963, 967). On one occasion Basile, having learned through an acquaintance that he (Basile) could get heroin from "Natie Behrman" (petitioner Behrman) for "$7,500 a kilo," asked Maimone "what are we paying $8,000 [per kilogram] for?" (R. 952–954). When Basile confronted DiPalermo with his information that he could buy heroin from Behrman for $500 a kilogram less than DiPalermo was charging, DiPalermo, ac-

knowledging that his own source of supply was Behrman, offered to reduce his price to Basile and his partners to $7,000 per kilogram if they would continue to buy their heroin from him—a proposal which Basile accepted (R. 955).

The partners Basile, Maimone, and Yacono had some thirteen regular customers—located in New York, Boston, and Washington—for the narcotics which they purchased from DiPalermo (R. 991–992). One of these was petitioner Mirra, whom Maimone requested Basile to "[t]ake care of" (R. 983–984). During August and September 1955, Mirra made numerous purchases from Basile, paying $350 an ounce for heroin and $500 an ounce for cocaine (R. 984–989).

ARGUMENT

1. Petitioners urge that there was a fatal variance between the indictment and the proof in that the indictment charged a single, continuing conspiracy lasting from 1950 to 1956, but the proof showed a number of separate and independent conspiracies, each of shorter duration, and with differing personnel. We submit, however, that the court of appeals correctly held (5 R. 486; No. 234, Pet. 33) that "there was sufficient evidence to go to the jury as to the existence of a single continuing conspiracy,"

No. 234, Pet. 9-13; No. 257, Pet. 22; No. 304, Pet. 35-45; No. 305, Pet. 33-38; No. 308, Pet. 7-9; No. 310, Pet. 13-17, 23; No. 313, Pet. 20; No. 235 Misc., Pet. 11.

and that the evidence supports the jury's verdict that there was only one, and not several conspiracies.[6]

It is true, as noted by the court of appeals (5 R. 486; No. 234, Pet. 32), that there was a "gap" in the government's evidence between December 1952 and December 1953 in the sense that "many of the actors in the group described by Lafitte are not seen again after December 1952."[7] It is also true that there was no proof that many of the actors in the later period figured in the earlier period. But, as the court further noted, "Gelb and Baruche's activities, central to both phases, were exactly the same after the gap in the testimony as before, and no intervening change was shown" (5 R. 486; No. 234, Pet. 33).[8] In addition, Behrman, who appears so prominently in the later period, had already put in his appearance at the earlier stage, before Lafitte departed to undertake other investigative assignments (*supra*, pp. 7–8).[9]

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[6] The trial judge charged the jury (R. 1726): "If you should find that instead of one overall conspiracy, there were separate and independent agreements unrelated to one central plan, you cannot find the existence of the one conspiracy as charged in the indictment and you must return a verdict of not guilty for all the defendants."

[7] When Gelb was arrested in March 1954, his place as the organization's financier was taken by Stromberg (*supra*, pp. 9–11). The fact, however, that one person is replaced by another in a criminal venture of this sort plainly does not have the legal effect of terminating one conspiracy and starting another. See opinion below (5 R. 486; No. 234, Pet. 32–33).

[8] While the court of appeals thought that Behrman's "one reported appearance at Aron's office" in 1952 was "hardly strong enough to tie him to the conspiracy before 1953" (5 R. 486; No. 234, Pet. 32), his appearance is a factor to be considered in determining whether the proof established a single or multiple conspiracies.

And while Aron, a central figure in the earlier period, does not appear in person in the later phases, he is, by inference, still active in the later period, as evidenced by the 1954 trip by Behrman and Vellucci to "Gene's [Baruche's] partner's house" (*supra*, p. 10).

There was thus—in the language of the court below (5 R. 487; No. 234, Pet. 34)—a central "core of conspirators" who were common to both the earlier and later phases. And since a conspiracy, once established, is presumed to continue until the contrary is shown (*Hyde* v. *United States*, 225 U.S. 347, 369; *United States* v. *Cohen*, 145 F. 2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799; *Poliafico* v. *United States*, 237 F. 2d 97, 106 (C.A. 6), certiorari denied, 352 U.S. 1025), the relatively brief "gap" in the government's evidence is inconsequential. The conspiracy, shown to have been in existence and fully operating in and for some time prior to December 1952, was still active and operating, with the same core of membership, a year later, when the government's evidence again picked up its trail.

Thus, the conspiracy here is wholly unlike the "hub-and-spokes" type of enterprise[9] which was involved in *Kotteakos* v. *United States*, 328 U.S. 750, where there were separate groups whose only connection with one another was that all used the same individual as a broker to handle their fraudulent loan applications. It is a typical "chain" type of narcotics conspiracy, consisting of the smugglers at

[9] See Note, *Federal Treatment of Multiple Conspiracies*, 57 Col. L. Rev. 387, 388–393 (1957).

one end, the retail distributors at the other end, and the wholesalers and other middlemen in the middle. Cf. *United States* v. *Bruno*, 105 F. 2d 921 (C.A. 2), reversed on other grounds, 308 U.S. 287; *United States* v. *Tramaglino*, 197 F. 2d 928 (C.A. 2), certiorari denied, 344 U.S. 864; *United States* v. *Rich*, 262 F. 2d 415 (C.A. 2). Here, as in *United States* v. *Bruno*, *supra*, 105 F. 2d at 922—

> * * * the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.

Cf. also, *Blumenthal* v. *United States*, 332 U.S. 539, 558, where this Court pointed out that the salesmen in the illicit enterprise there involved "knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all." See also *Nye & Nissen* v. *United States*, 336 U.S. 613, 616–617.

2. Also without merit is petitioners' contention that, apart from any alleged variance, their "mass trial"

with seven others, on an indictment charging a total of 46 defendants and 16 others as co-conspirators, deprived them of a fair trial.[10] Cf. *United States v. Cohen, supra,* 145 F. 2d 82 (75 defendants indicted, 27 jointly tried); *Allen* v. *United States,* 4 F. 2d 688 (C.A. 7) (75 indicted, 63 jointly tried); *United States* v. *Bruno, supra,* 105 F. 2d 921 (88 indicted, 20 jointly tried). The question of how many defendants shall be tried together is one for the sound discretion of the trial court. Cf. *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, 635 (C. A. 2), certiorari denied, 329 U.S. 742. Here, as stated by the court of appeals, "in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of the defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law" (5 R. 488; No. 234, Pet. 35). See also the further discussion of this contention in the opinion below at 5 R. 488–491; No. 234, Pet. 35–39.

3. Petitioners Teitelbaum, Puco, and De Saverio contend that the evidence against them individually is insufficient to sustain their convictions (No. 305, Pet. 38–39; No. 234, Pet. 17–21; No. 235 Misc., Pet. 11–14). Teitelbaum, however, was present at the delivery of $40,000 by Stromberg to Behrman and two later deliveries of substantial sums to Strom-

[10] No. 234, Pet. 13; No. 257, Pet. 22; No. 304, Pet. 45–52; No. 305, Pet. 14–18, 33–38; No. 308, Pet. 7–8; No. 310, Pet. 14–17; No. 313, Pet. 20; No. 235 Misc., Pet. 11.

[11] Brief for the United States, No. 300, Oct. Term, 1939, p. 4.

berg, all in connection with their narcotics dealings (*supra*, pp. 10–11). He was also present at at least one conversation between Behrman and Stromberg relating to narcotics (*supra*, p. 10). Even more significant, Teitelbaum once accepted on Stromberg's behalf a payment by Vellucci, and made a remark at the time—that Vellucci "must be unloading lots of drugs"—which manifested his awareness of the nature of these dealings (*supra*, p. 11). The evidence against Puco and De Saverio, summarized *supra*, pp. 11–12, 13, amply warranted the jury in finding that they were regular purchasers of heroin from Vellucci in kilogram lots, or substantial fractions thereof. So long as there is "knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users," he may lawfully be regarded as one of the "accredited members of the conspiracy." *United States* v. *Rich*, 262 F. 2d 415, 418 (C. A. 2).

4. Petitioners Stromberg and Seto, relying on *Smith* v. *United States*, 348 U.S. 147, 155, contend that government witness Lafitte's testimony concerning incriminating statements made to him by some of the co-conspirators was uncorroborated, and that the lack of corroboration was fatal to the prosecution's case (No. 304, Pet. 52–59; see also No. 313, Pet. 4). As the court of appeals noted, however, there was corroboration of Lafitte's testimony (5 R. 481–482; No. 234, Pet. 27–28). In any event, the *Smith* case held only that extrajudicial admissions "made after the fact to an official charged with investigating the possibility of wrongdoing" require some corroboration

(p. 155). See also *Opper* v. *United States*, 348 U.S. 84, 89–92. The court of appeals here correctly ruled that the statements made to Lafitte "cannot properly be classified as extrajudicial admissions. They were made during the life of the conspiracy and were not therefore admissions after the fact. * * * They were in furtherance of the conspiracy, since, as Lafitte testified, Gelb, Baruche and Aron were seeking his participation" (5 R. 503; No. 234, Pet. 51–52).

5. In the course of government witness Ewing's cross-examination, the court received in evidence and permitted to be read to the jury the record of a court-martial conviction of Ewing for desertion and sodomy (R. 638–641; 5 R. 462–465). Ewing admitted the conviction, but denied having committed the act of sodomy charged (R. 640–642). He also testified, after first stating that no witnesses had appeared against him at the court-martial trial (R. 642), that he did not remember whether any witnesses had appeared (R. 644, 645). Defense counsel then offered in evidence the transcript of the court-martial proceedings to prove that witnesses had testified against Ewing, but the court declined to receive it (R. 646–647). Several of the petitioners contend that this was error.[12]

The law is well settled, however, that the extent to which cross-examination on a collateral matter should be permitted is discretionary with the trial judge.

[12] No. 234, Pet. 13–15; No. 257, Pet. 8–14; No. 305, Pet. 12–13, 40; No. 235 Misc., Pet. 2, 11.

E.g., Dolan v. *United States*, 218 F. 2d 454, 459 (C.A. 8), certiorari denied, 349 U.S. 923; *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2), certiorari denied, 309 U.S. 664. The subject of Ewing's court-martial conviction was a collateral matter. Moreover, assuming that the transcript of the court-martial proceedings would have proved that witnesses had testified against Ewing, such proof would not have contradicted Ewing's testimony that he did not remember whether witnesses had testified against him or not. As the court of appeals stated (5 R. 505; No. 234, Pet. 55), "the particular matter involved went far beyond establishing a criminal conviction. It was a collateral matter, and we think the trial judge wisely exercised his discretion in excluding it." Cf. *United States* v. *Tomaiolo*, 249 F. 2d 683, 687 (C.A. 2).[13]

6. Counsel for petitioner Behrman, in cross-examining Ewing, directed the witness' attention to a statement Ewing gave government agents following his arrest relating to the source of his narcotics, and asked if he "mention[ed] the name Nathan Behrman in that statement" (R. 768–770). When Ewing replied that he could not answer the question "without

[13] The same considerations are dispositive of the contention (No. 234, Pet. 15; No. 257, Pet. 14–16; No. 305, Pet. 40; No. 235 Misc., Pet. 2, 11) that the trial court erred in excluding records of the New York State Motor Vehicles Bureau showing that no automobile dealer was registered under the name of "Linden Motors," which the defense offered for the purpose of impeaching Ewing's testimony on cross-examination that he was employed as a salesman for an automobile dealer by that name (R. 783, 1351–1352).

an explanation" (R. 770), the court told him he should first answer and then explain (R. 771). Ewing then responded, "No, I didn't mention his name in there because at that time I was not dealing with Nathan Behrman. At that time Nathan was in jail" (*ibid.*). The court promptly instructed the jury to disregard so much of the answer as related to Behrman's having been in jail (*ibid.*). Behrman and other petitioners argue that the statement required a mistrial.[10] As pointed out by the court below, however, the witness' answer "was unforeseeable" and "plainly * * * had not been induced by the prosecution"; "in the setting of this case the prompt instruction to disregard the answer cured the error" (5 R. 497; No. 234, Pet. 45, 46). Cf. *United States* v. *Giallo*, 206 F. 2d 207, 209–210 (C.A. 2), affirmed 346 U.S. 929.

7. Pursuant to 18 U.S.C. 3500 (the so-called "Jencks" Act), the government delivered to the defense, following witness Ewing's direct examination, (1) more than 260 pages of prior statements by this witness to government agents, consisting of substantially verbatim, contemporaneously recorded recitals of oral statements, and (2) the transcript of Ewing's grand jury testimony (Tr. 1014–1019). The government declined to deliver a report by Agent Cusack (Gov. Ex. 105 for identification) on the ground that is was not a "statement" as defined in 18 U.S.C. 3500. Following a hearing at which the agent testified (R.

[10] No. 308, Pet. 9–10; No. 234, Pet. 16–17; No. 257, Pet. 16–17; No. 235 Misc., Pet. 3, 11.

819–835), the trial judge found that the report (which the judge personally examined) was not a substantially verbatim, contemporaneously recorded statement, and accordingly declined to order its delivery to the defense (Tr. 1740–1743). Petitioners Stromberg and Seto—without questioning the correctness of the trial judge's determination that the agent's report was a "non-qualifying document"—contend that the judge should, as a matter of "discretion," have ordered its production (No. 304, Pet. 60–62). This contention, however, must be rejected because of this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, 349–351, that the statutory procedures established by the "Jencks" Act are "exclusive"; *i.e.*, that "statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500, cannot be produced at all" (360 U.S. at 351).

8. Petitioner Teitelbaum argues (No. 305, Pet. 31–32, 52–53; see also No. 313, Pet. 2, 20) that the defendants were entitled to have the jury instructed that "there was no corroboration of" the accomplice-witnesses Ewing and Basile, and that the jury should "consider their testimony with great caution" and not "convict a defendant on such uncorroborated testimony unless they believe it beyond all reasonable doubt" (No. 305, Pet. 31). Since, as the court below pointed out (5 R. 484; No. 234, Pet. 30), one of the accomplice-witnesses, Ewing, was corroborated on significant aspects of his testimony, the instruction in the form requested was unacceptable.

Moreover, the substance of the requested instruction was given. The judge told the jurors that they "must consider [the accomplices'] testimony carefully and act upon it with caution," but that they nevertheless could accept the testimony, although uncorroborated, if they found it credible (5 R. 1781–1782). This correctly stated the applicable law. *Caminetti* v. *United States*, 242 U.S. 470, 495; *Krulewitch* v. *United States*, 336 U.S. 440, 454 (Mr. Justice Jackson, concurring); see also opinion below at 5 R. 503–504; No. 234, Pet. 52–53.[15]

9. Petitioners urge that they were deprived of a fair trial by alleged misconduct on the part of the prosecuting attorney, principally certain remarks made in his summation.[16] This contention is thoroughly considered in the opinion below (5 R. 493–502; No. 234, Pet. 46–51), where the principal incidents relied on are discussed and their impact on the trial evaluated. The court concluded that most of the acts and statements relied on were not improper, and that none was of such a nature as to warrant reversal. We submit that this conclusion is correct. We discuss briefly the two incidents in respect of which the court of appeals criticized the prosecutor's conduct.

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[15] Petitioner De Saverio's contention (No. 235 Misc., Pet. 14–17) that the trial court erred in refusing his requested instruction that there was no evidence that Ewing and Vellucci "ever went to the 101 Club after the summer of 1954" (*id.* 15; see R. 1629, 1630) is fully answered in the opinion below at 5 R. 495–496; No. 234, Pet. 42–44.

[16] No. 257, Pet. 19–22; No. 304, Pet. 62–65; No. 305, Pet. 16–31, 40–50; No. 308, Pet. 10–11; No. 310, Pet. 17–22; No. 313, Pet. 5–6, 20; No. 235 Misc., Pet. 3, 11.

(*a*) The prosecutor's remark in summation that "even Brisbois, who had the courage to take the stand, corroborated [Lafitte]" (R. 1546) was, as the court concluded, not so prejudicial in the context of this long trial as to require a new trial. As pointed out by the court (5 R. 501; No. 234, Pet. 49), "[s]everal of the defendants' counsel had already commented upon their clients' failure to take the stand" (*e.g.*, Tr. 4082, 4168–4169, 4186), and "Brisbois' counsel had emphasized that his client had taken the stand" (Tr. 4224, 4228, 4231, 4241, 4243, 4260). Moreover, as further noted by the court (5 R. 501; No. 234, Pet. 49–50), "a clear instruction to the jury [that no unfavorable inference was to be drawn from a defendant's failure to testify] was included in the judge's charge" (see R. 1783).

(*b*) During the trial, the prosecutor made a public speech concerning the menace of organized crime. The court below, while of the view that it was "unfortunate and undesirable," concluded that it did not "affect the fairness of the trial" (5 R. 498–500; No. 234, Pet. 46–48). The court pointed out that the speech made "[n]o reference * * * to this case or to any of the defendants."[17] (5 R. 498; No. 234, Pet. 46). See *United States* v. *Postma*, 242 F. 2d 488, 494–495 (C.A. 2), certiorari denied, 354 U.S. 922, where convictions were affirmed notwithstanding contemporary newspaper publicity which, the court below noted, was "distinctly more damaging to the

[17] The text of the speech appears at 5 R. 466–470.

defendants than the article involved in this case" (5 R. 500; No. 234, Pet. 48).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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